Supreme Court, U. S.
FILED
JAN 14 1981
MICHAEL RODAK, JR., CLERK

No. 80-1183

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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STATE OF MISSISSIPPI,
*Appellant,*

v.

BENJAMIN E. CIVILETTI and
THE UNITED STATES OF AMERICA,
*Appellees.*

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**On Appeal from the United States District Court for the District of Columbia**

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## JURISDICTIONAL STATEMENT

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**January 14, 1981**

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to hear an interlocutory appeal pursuant to the direct appeal procedure under 42 U.S.C. § 1973c and *NAACP v. New York*, 413 U.S. 345 (1973).

2. Whether an order granting a motion to disqualify counsel is a final decision on a collateral matter so as to qualify for appeal pursuant to 42 U.S.C. § 1973c and 28 U.S.C. §§ 1253, 1291, and 2284 under the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

3. Whether a submission made in 1979 pursuant to section 5 of the Voting Rights Act is the same matter as a submission made in 1970 when based upon a different statute passed by a different legislature and, if the same matter, whether the Government waived its right to seek disqualification by failing to raise the issue in a prior Voting Rights Act case involving the same issues.

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The opinion of the district court is not reported and is reproduced in the Appendix.

### JURISDICTION

This is a direct appeal by the State of Mississippi (the State) from the judgment of the United States District Court for the District of Columbia entered on October 28, 1980, ordering the disqualification of the State's counsel

and the separation of counsel and his law firm from further participation in a de novo section 5 review of a submission by the State pursuant to the Voting Rights Act of 1965 as amended, 42 U.S.C. §§ 1973 *et seq.*, seeking the implementation of an "open primary" for all elected officials in the State. Jurisdiction also was invoked pursuant to 28 U.S.C. § 1331. Notice of Appeal was filed in the United States District Court for the District of Columbia on October 28, 1980. The jurisdiction of this Court is invoked under 42 U.S.C. § 1973c.

## STATUTE INVOLVED

The statute involved is section 5 of the Voting Rights Act:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different

from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of

three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Voting Rights Act § 5, 42 U.S.C. § 1973c.

## STATEMENT OF THE CASE

From February 1969 until May 1971, Jerris Leonard served as Assistant Attorney General for Civil Rights. In 1970, the State of Mississippi (the State) submitted to the Attorney General House Bills 362 and 363, which contained changes in Mississippi's electoral system, for preclearance pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. On September 21, 1970, Mr. Leonard responded to that submission, stating that the Attorney General was "not prepared [within the required statutory period] to make any determination of the validity or invalidity [of the changes] under the Voting Rights Act."[1] Letter from Jerris Leonard to A. F. Summer at 2 (Sept. 21, 1970), attached as Exhibit 1 to Memorandum in Opposition to Defendants' Motion for Order Disqualifying Plaintiff's Counsel (Opposition Memorandum).

On February 25, 1974, Mississippi resubmitted House Bills 362 and 363 to the Attorney General. At that time, Mr. Leonard's successor as Assistant Attorney General for Civil Rights, J. Stanley Pottinger, characterized the 1970 submission as "prior *similar* proposals" and objected to their implementation. Letter from J. Stanley Pottinger to A. F. Summer at 2 (Apr. 26, 1974) (emphasis added), attached as Exhibit 2 to Opposition Memorandum. Mr. Pottinger found that the *Evers* case "foreclosed" any further action on the 1970 submission. *Id.*

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[1] Subsequently, the United States District Court for the Southern District of Mississippi held that the Department's failure to approve the bills precluded their implementation. *Evers v. State Board of Election Commissioners*, 327 F.Supp. 640 (S.D.Miss. 1971) (per curiam), *appeal dismissed*, 405 U.S. 1001 (1972).

In 1976, the United States District Court for the Southern District of Mississippi, pursuant to *Connor v. Johnson*, 330 F.Supp. 506, *supplemented in* 330 F.Supp. 521 (S.D.Miss. 1971) (per curiam), formulated an apportionment plan for the 1979 quadrennial election. *Connor v. Finch*, 419 F.Supp. 1072 (S.D.Miss. 1976). The Department of Justice intervened sometime between June 10, 1975, and August 24, 1976. *See Connor v. Finch*, 431 U.S. 407, 412 n.8 (1977). Thereafter, Mr. Leonard was retained to represent Mississippi before the Supreme Court. "The issue primarily presented and argued [was] whether the District Court plan impermissibly dilute[d] Negro voting strength." *Id.* at 431 (Powell, J., dissenting). This Court ruled for Mississippi but did not reach the dilution question. *See id.* at 421.

On June 1, 1978, Mississippi's Attorney General submitted a newly enacted apportionment statute to the Attorney General of the United States for preclearance under section 5. On July 31, 1978, Assistant Attorney General for Civil Rights, Drew S. Days, III, objected to the statute, stating that "we have been unable to conclude that the submitted plans for the Mississippi Senate and House of Representatives do not have the purpose or effect of abridging the right to vote because of race or color." Letter from Drew S. Days, III to A. F. Summer at 2 (July 31, 1978), attached as Exhibit 3 to Opposition Memorandum.

Represented by Mr. Leonard, the State of Mississippi filed an action for declaratory relief pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *Mississippi v. United States*, No. 78-1425 (D.D.C. June 1, 1979), *aff'd mem.*, 100 S.Ct. 994 (1980) *(Mississippi I)*. Again the issue was whether the statute in question resulted in the dilution of black electoral strength. *See id.*, slip op. at 4, 5, 8, 10, 11, 14-16, 19, 21-23 & n.6.

On April 12, 1979, Mississippi submitted the legislation which is the subject matter of this suit (Senate Bill 2802) to the Department of Justice for preclearance under section 5 and, in documents then submitted, provided Mr. Leonard's name to the Department of Justice specifying that he was "Counsel for the Legislature." Affidavit of Mississippi's Attorney General William A. Allain at 2 (Allain Affidavit), attached to and incorporated by reference in the Opposition Memorandum.

On June 11, 1979, Assistant Attorney General Days objected to this statute, basing his objection upon the dilution of the electoral strength of black voters and stating: "Under Section 5 an objection is required if the modifications of the electoral system of the State of Mississippi made by Senate Bill 2802 would 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" Letter from Drew S. Days, III to A. F. Summer at 2 (Jun. 11, 1979), attached as Exhibit 4 to Opposition Memorandum.

On December 27, 1979, the State, with Mr. Leonard and his firm as its counsel, sought de novo review of Senate Bill 2802 in the United States District Court for the District of Columbia pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973. On April 2, 1980, the Government filed its motion to disqualify counsel on the ground that the 1970 and 1979 submissions were the same matter. On September 29, 1980, the three-judge district court disqualified Mr. Leonard and his firm from further participation in this case.

Under the law of Mississippi, different legislatures passed the statutes considered in the 1970 and 1979 submissions. Miss. Const. § 36. Additionally, not only are the 1970 and 1979 enactments different (fewer than half of the provisions of the statutes are even comparable), *see* A Comparative Digest of the 1970 and 1979 Missis-

sippi Open Primary Laws, attached as Exhibit 5 to Opposition Memorandum, but in social, political, and electoral terms, Mississippi itself is different. In 1970, there was one black member of the Mississippi Legislature. Today, there are 17. In 1970, both of Mississippi's United States senators were Democrats. Today, one is a Democrat; the other is a Republican. In 1970, there were 81 black elected officials in Mississippi; by 1979, there were 327, and the state ranked second only to Louisiana. 9 Joint Center for Political Studies, National Roster of Black Elected Officials, Table 1 at x-xi (1979).

## REASONS FOR NOTING PROBABLE JURISDICTION

### I. THIS COURT HAS UNIQUE APPELLATE JURISDICTION OVER APPEALS FROM STATUTORY THREE-JUDGE FEDERAL DISTRICT COURTS ON ALL ISSUES ARISING PURSUANT TO LITIGATION UNDER THE VOTING RIGHTS ACT OF 1965, AS AMENDED.

This Court must be able to determine the authority of the court below " 'to make such corrective order as may be appropriate to the enforcement of the limitations which that section [of the law in question] imposes.' " *Bailey v. Patterson*, 369 U.S. 31, 34 (1962) (per curiam), *quoting Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 18 (1934) (per curiam). 42 U.S.C. § 1973c provides for direct review of "*any* appeal" by this Court of any decision by a three-judge district court duly constituted under the provisions of the Voting Rights Act. In *NAACP v. New York*, 413 U.S. 345 (1973), this Court's only prior ruling on the jurisdictional issue presented here,[2] the words "any appeal" were held to require

[2] *NAACP* was brought pursuant to section 4 of the Voting Rights Act, 42 U.S.C. § 1973b. This action is brought pursuant to section 5, 42 U.S.C. § 1973c. The appellate jurisdiction is exactly the

Supreme Court review of the collateral issue of intervenor standing. *Id.* at 354.

Congress sought to have the broad statutory and constitutional principles at issue in Voting Rights Act cases subjected to timely and economical adjudication, *id.*, and district court disqualification orders fall within the language of *NAACP v. New York*, because such orders are "meaningful judicial determination[s] made in the progress of the § 4 lawsuit." *Id.* at 353-54.[3]

Because direct-appeal statutes provide an expedited procedure to ensure speedy resolution of important issues, this Court has held that under certain unique statutes, it has jurisdiction to review direct appeals from three-judge district court orders on grounds short of the merits.[4] To allow an exception to this process would

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same in both sections: "An action . . . shall be heard and determined by a court of three judges . . . and *any appeal shall lie to the Supreme Court.*" 42 U.S.C. §§ 1973b(a), 1973c (emphasis added).

[3] In *NAACP*, the United States "'substantially' agree[d] that this Court has jurisdiction to review on direct appeal the denial of intervention in an action of this kind." 413 U.S. at 353, *quoting* Brief for United States (footnote omitted). Of course, this Court is the ultimate arbiter of its own jurisdiction. 413 U.S. at 353; *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). As Chief Justice Marshall observed in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should."

[4] *See American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 409 U.S. 467 (1973) (per curiam); *Mitchum v. Foster*, 407 U.S. 225 (1972); *Carter v. Stanton*, 405 U.S. 669 (1972) (per curiam); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Granite Falls State Bank v. Schneider*, 402 U.S. 1006 (1971); *Flast v. Cohen*, 392 U.S. 83 (1968); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Doud v. Hodge*, 350 U.S. 485 (1956).

nibble away at Congress' clear intent and ultimately allow this Court's jurisdiction to "evaporate." *Hicks v. Miranda*, 422 U.S. 332, 343 (1975).

As this Court noted in contrasting the "any appeal" language of section 1973b(a) of the Voting Rights Act with that of 28 U.S.C. § 1253, the language "any appeal" differs significantly from the language "any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." *NAACP v. New York*, 413 U.S. at 356. Striking differences also are found between § 1973c and 42 U.S.C. § 1971g ("from the final judgment" of the three-judge court); 28 U.S.C. § 1291 ("appeals from all final decisions"), and 28 U.S.C. § 2284 ("any action required to be heard and determined by a district court of three judges").

"The broader language of § 4(a), when viewed in the light of Congress' concern about hastening the resolution of suits involving voting rights, . . . prompts us to conclude that the . . . § 4(a) appeal is directly here and not to the Court of Appeals." *NAACP v. New York*, 413 U.S. at 355 (citation omitted).

Probable jurisdiction, therefore, should be noted.

## II. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER AND ITS APPELLATE JURISDICTION TO HEAR APPEALS OF ORDERS DISQUALIFYING COUNSEL IN ORDER TO SAFEGUARD THE BASIC RIGHT OF LITIGANTS TO COUNSEL OF THEIR CHOICE.

This case falls into "the 'small class of cases' that [*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)] has placed beyond the confines of the final-judgment rule." *Abney v. United States*, 431 U.S. 651, 659 (1977). When its standards are met, *Cohen* "allows immediate appeals from certain orders that do not fully

and finally terminate the litigation between the parties." *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1024 (D.C.Cir. 1976).[5]

The four *Cohen* standards are met here.

1. The district court's ruling on the matter must not be "tentative, informal or incomplete." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. Here the disqualification issue has been finally decided.

2. The ruling must be "separable from, and collateral to, rights asserted in the [main] action." *Id.* Here the disqualification ruling is not a step toward final judgment into which that ruling would "merge." It does not "affect, [n]or [is it] . . . affected by, [any] decision of the merits." *Id.* It is so "independent of the cause itself," *id.*, that appellate disposition should await no further action on the main matter. Disqualification of counsel is important, is entirely collateral to the merits, and, if erroneous, is effectively unredressable after final judgment on the merits.

3. The matter under review must present "a serious and unsettled question." *Id.* at 547. There is a conflict among the circuits on the issue of attorney disqualification. *Compare, e.g., Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *petition for cert. filed*, 49 U.S.L.W. 3334 (U.S. Sept. 18, 1980) (No. 80-431) (disqualification immediately reviewable) *and Akerly v. Red Barn System, Inc.*, 551 F.2d 539 (3d Cir. 1977) (refusal to disqualify immediately reviewable) *with Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022 (refusal to disqualify not immediately reviewable).

4. The matter must demonstrate a risk of important loss if present review is not available. The injury to the

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[5] The *Cohen* criteria have been reaffirmed. *See United States v. MacDonald*, 435 U.S. 850 (1978); *Abney v. United States*, 431 U.S. 651 (1977).

aggrieved party must be "too important to be denied review," so that the party is "probably irreparably" damaged. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. Here the rights of the attorney as well as those of his client will be irreparably lost if review is postponed until final judgment on the merits, for Mississippi must proceed through other counsel,[6] and that satisfies the "irreparable injury" requirement of *Cohen. Armstrong v. McAlpin*, 625 F.2d at 439 n.11.

Absent immediate appeal of the disqualification issue, "it will be too late [after final disposition of the case on the merits] effectively to review the present order and . . . rights . . . will have been lost, probably irreparably."

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[6] It is enough that no further consideration of the order is contemplated by the court below. *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1118 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). Nor is the express entry of a final judgment provided for by F.R.Civ.P. 54(b) required. *See, e.g., Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 560-61 (7th Cir. 1975). On the disqualification issue, the district court has had its last word, *see Premium Service Corp. v. Sperry & Hutchinson, Co.*, 511 F.2d 225, 228 (9th Cir. 1975), and "nothing else can be done in the court below which would be worth doing." *The Attualita*, 238 F. 909, 910 (4th Cir. 1916). This case "fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the [main] action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. This appeal, therefore, is "not an ingredient of the [main] cause of action and does not require consideration with it." *Id.* at 546-47. Rather, it has reached that point where it is "fairly severable," *Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684, 689 (1950), so that it may be addressed "without any reference to the substance of the [main] action." *Borden Co.* v. *Sylk*, 410 F.2d 843, 846 (3d Cir. 1969). In essence, this appeal "is an action itself, a separate litigation." Underwood, *Appeals in Federal Practice from Collateral Orders*, 36 Va.L.Rev. 731, 738 (1950).

*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546.[7]

The requirement that a significant question of law must be present in order to justify immediate review has been held to mean that the issue be "important" or "too important to be denied review." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Abney v. United States*, 431 U.S. at 658.

One measure of importance is a conflict among the circuits. Five circuits require a *Cohen* analysis of appealability of disqualification motions;[8] five circuits permit interlocutory appeals of *denials* of disqualification;[9] four

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[7] Several courts have recognized that, in cases disqualifying counsel, no effective review could be had on appeal of the case on the merits. *See United States* v. *Deutsch*, 599 F.2d 46, 48 (5th Cir.), *cert. denied*, 444 U.S. 935 (1979) (appointment of counsel for criminal defendant); *Hudak v. Curators of the University of Missouri*, 586 F.2d 105, 106 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979) (appointment of counsel in civil rights case); *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977) (appointment of counsel under Title VII of the Civil Rights Act).

[8] *See Grinnell Corp. v. Hackett*, 519 F.2d 595, 597-98 & n.4 (1st Cir.), *cert. denied*, 423 U.S. 1033 (1975); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800, 802 (2d Cir. 1974), *overruled on other grounds, Armstrong v. McAlpin*, 625 F.2d 433; *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 571 F.2d 390, 393, *rev'd on other grounds*, 584 F.2d 201 (7th Cir. 1978) (en banc); *Van-S-Aviation Corp. v. Piper Aircraft Corp.*, 551 F.2d 213, 217 (8th Cir. 1977); *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1124 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979).

[9] *See Akerly v. Red Barn System, Inc.*, 551 F.2d 539; *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978); *Brown & Williamson Tobacco Corp. v. Daniel International Corp.*, 563 F.2d 671 (5th Cir. 1977); *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979) (by implication); *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

circuits do not permit such interlocutory appeals;[10] and pending in this Court are two cases arising from denials of disqualification.[11]

The arguments favoring appeals of orders granting disqualification, as in this case, are more compelling than those relating to denials of disqualification. As the Second Circuit observed en banc:

> [i]n such cases, the losing party is immediately separated from counsel of his choice. If the order is erroneous, correcting it by an appeal at the end of the case might well require a party to show that he lost the case because he was improperly forced to change counsel. This would appear to be an almost insurmountable burden. In addition, permitting an immediate appeal from the grant of a disqualification motion does not disrupt the litigation, since the trial must be stayed in any case while new counsel is obtained. Moreover, the grant of a disqualification motion may effectively terminate the litigation if the party whose counsel is disqualified cannot afford to hire new counsel to begin the litigation anew. . . . Furthermore, the granting of a disqualification motion by a district judge is a fair indication that a nonfrivolous issue has been raised; there is no similar assurance that appeals from denials of disqualification motions will raise a substantial question. Thus, it is far less likely that appeals from orders granting disqualification motions will be taken purely for tactical reasons. Finally, disqualification often im-

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[10] *See Armstrong v. McAlpin*, 625 F.2d 433; *Firestone Tire & Rubber Co. v. Risjord*, 612 F.2d 377 (8th Cir.), *cert. granted*, 100 S.Ct. 2150 (1980); *Chugach Electric Ass'n v. United States District Court for the District of Alaska*, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 863 (1967); *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022.

[11] *Firestone Tire & Rubber Co. v. Risjord*, 100 S.Ct. 2150; *Armstrong v. McAlpin*, 49 U.S.L.W. 3334.

> pairs the reputation of the disqualified firm or attorney, and this injury may never be corrected on appeal if the party is satisfied with the performance of his new counsel.

*Armstrong v. McAlpin*, 625 F.2d at 440-41.

"[G]rants of disqualification motions . . . should therefore be immediately appealable as a matter of right." *Id.* at 441.

## III. DISQUALIFICATION WAS IMPROPER BECAUSE THE 1970 AND 1979 SUBMISSIONS INVOLVE DIFFERENT MATTERS AND, EVEN IF THE SAME, THE GOVERNMENT WAIVED ITS RIGHT TO SEEK DISQUALIFICATION.

"[A]t least a modest initial exploration of the merits of the collateral issue itself" should be made here, 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3911, at 494 (1976), because "the importance of the controversy cannot be decided in a vacuum." *United States v. Perkins*, 433 F.2d 1182, 1186 (D.C.Cir. 1970). The district court concluded that Mr. Leonard "participated personally and substantially in the matter before the Court while he was employed by the Department of Justice," and that "DR 9-101(B) [of the ABA Code of Professional Responsibility] preclude[d] further participation in this action by Leonard or any member of his law firm."

The Government contended and the lower court apparently agreed that, because of a prior section 5 "non-action" [12] involving the State's 1970 submission during

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[12] Acting on behalf of the Attorney General, Mr. Leonard neither approved nor disapproved of the State's 1970 submission. Exhibit 1 to Opposition Memorandum at 3 ("I want to make clear that no inference of approval or disapproval is to be drawn from the failure of the Attorney General to object . . . .").

his tenure as Assistant Attorney General for Civil Rights, Mr. Leonard's representation of the State in its efforts to obtain approval of the 1979 submission contravenes Canon 9 of the Code of Professional Responsibility of the American Bar Association (ABA Code). But the statutes involved in the 1970 and 1979 submissions are different, were enacted by different legislatures, and were signed by different governors during socially and politically different times.[13]

As in many other section 5 cases, the 1970 and 1979 submissions, as well as the statutes in question in *Connor v. Finch*, 431 U.S. 407, and *Mississippi I*,[14] while different, did present a common *legal* issue—whether the dilution of black voting strength is statutorily permissible.

When Mississippi resubmitted precisely the same acts that were the subject of the 1970 submission (House Bills 362 and 363) to the Department of Justice in 1974, the then Assistant Attorney General for Civil Rights, J. Stan-

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[13] Even Assistant Attorney General Days, one of the attorneys that represented the Government in the lower court, has noted the changes that have occurred in the State.

> Q. Do you agree that things have changed dramatically for the better since 1963-64 compared to what it is today?
>
> A. Yes, I think there have been substantial improvements.

Deposition of Drew S. Days, III at 70, *Mississippi I*.

[14] Dilution was *the* issue in *Connor v. Finch* and in *Mississippi I*. *See, e.g.*, 431 U.S. at 409, 422-26; No. 78-1425, slip op. at 4-5, 8, 10-11, 14-16, 19, 21-23 & n.6. Indeed, Justice Powell, dissenting in *Connor v. Finch*, noted: "The issue primarily presented and argued in these appeals is whether the District Court plan impermissibly dilutes Negro voting strength." 431 U.S. at 431. *Compare* Exhibit 4 to Opposition Memorandum at 2. There "retrogression" is the euphemism for "dilution": "Under Section 5 an objection is required if the modifications of the electoral system of the State of Mississippi made by Senate Bill 2802 would 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.*

ley Pottinger, characterized the 1970 submission as the "prior *similar* proposals," Exhibit 2 to Opposition Memorandum at 2, and found that *Evers v. State Board of Election Commissioners*, 327 F.Supp. 640 (S.D.Miss. 1971), *appeal dismissed*, 405 U.S. 1001 (1972), "*foreclosed*" any further action on the 1970 submission. Exhibit 2 to Opposition Memorandum at 2. Now, "as nimbly as if dancing a quadrille," *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953), the Government resurrects the 1970 submission to disqualify Mississippi's counsel of choice.

Yet, at least one court has warned that "[l]eveling the charge of impropriety at opposing counsel, which if sustained would require withdrawal, should not be a standard part of counsel's offensive armament to be used routinely or without reasonable and good faith belief in its necessity." [15] This is especially true when the litigant

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[15] *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F.2d at 206. To arbitrarily disqualify Mr. Leonard and his firm would be to "interfere needlessly with the right of litigants to obtain competent counsel of their choosing, particularly in specialized areas requiring special, technical training and experience," which the ABA was concerned about safeguarding, rather than vitiating, under DR 9-101(B). ABA Formal Opinion 342 at 5.

In a disqualification case, involving a former government employee, the court must balance "the client's right to counsel of his choice, the lawyer's right freely to practice his profession, and the government's need to attract skilled lawyers." *Woods v. Covington County Bank*, 537 F.2d 804, 812 (5th Cir. 1976). As the Second Circuit has noted:

> An overly strict approach to disqualification of the former government attorney and especially to disqualification of his firm impairs the client's choice of counsel and can impair the government's ability to attract non-career attorneys, if they come to believe that their post-government employment opportunities will be unduly restricted. These considerations themselves implicate ethical values concerning the availability of professional services.

*Armstrong v. McAlpin*, 606 F.2d 28, 32 (1979), *rev'd on other grounds*, 625 F.2d 433.

is the Government for its efforts to affect the selection of opposing counsel, if any, should be based upon compelling law and facts. However, the Government was "not . . . able to find a judicial or administrative precedent under § 207(a) that presents facts similar to those here." Memorandum by Leon Ulman for Drew S. Days, III (Mar. 4, 1980).

### A. Disqualification Under DR 9-101(B) Was Improper Because The 1970 Matter Was Different From That Which Is At Issue In The Present Litigation.

In 1970, while Mr. Leonard served as Assistant Attorney General for Civil Rights, Mississippi, pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, sought preclearance of House Bills 362 and 363 for changes in the electoral system. The Government contended that this "initial" submission was "virtually identical" to the legislation at issue in this case, and that because of this "virtual" identity, Mr. Leonard should be disqualified. Motion for Order Disqualifying Counsel at 1. The 1979 open primary bill is not, however, the same statute nor does it call into question the same factual issues as the 1970 submission. It was passed by a different legislature, in a state that has changed socially, politically, demographically, and economically since 1970, when the legislation considered by Mr. Leonard was submitted.[16]

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[16] Times (and places and minds) do change. For example, the Government in *Mississippi I* recognized the significance of the passage of time.

> While census figures are a useful index in considering whether a reapportionment plan dilutes black voting strength, such data should not be used to the exclusion of other factors, especially where, as here, eight years have elapsed since the 1970 census was taken and factors such as population shifts which have occurred since 1970, the size of the district, as well as the relative political abilities of the black or white voters included

Canon 9, on which the district court based its disqualification order,[17] counsels the attorney to "avoid even the appearance of professional impropriety." Disciplinary Rule 9-101(B) states that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The ABA's interpretation of "matter" is important when considering whether the "matter" before this Court is the same as the "matter" before Mr. Leonard while he was an Assistant Attorney General.

> Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, *work as a government employee in* drafting, *enforcing or interpreting government* or agency procedures, regulations, or *laws*, or in briefing abstract principles of law, *does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same* regulations, procedures, or *points*

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in the district are all critical in considering whether the reapportionment "designedly or otherwise" dilutes black voting strength.

Defendant's Proposed Findings of Fact and Conclusions of Law ¶ 27, at 22-23, *Mississippi I*, attached as Exhibit 6 to Opposition Memorandum; *see Control Data Corp. v. IBM Corp.*, 318 F.Supp. 145, 147 (D.Minn.), *aff'd*, 430 F.2d 1277 (8th Cir. 1970) (passage of 15 years has changed focus of industry from tabulation to computers, making prior government action in current private antitrust suits against the same defendant different matters).

[17] The Government also sought disqualification under Department of Justice Standards of Conduct, 28 C.F.R. § 45.735-7(a) (1979), and Canon 4 of the ABA Code.

> *of law*; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

ABA Formal Opinion 342 at 6 (emphasis added).

The purpose of DR 9-101(B), as interpreted by the Second Circuit and the ABA's Committee on Professional Ethics, is

> "[to avoid] the manifest possibility that . . . [a former Government lawyer's] action as a public legal official might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to *uphold or upset* what he had done."

*General Motors Corp. v. New York*, 501 F.2d 639, 649 (2d Cir. 1974), *quoting* ABA Comm. on Professional Ethics, Opinions, No. 37, at 124 (1931) (emphasis added). Here, however, Mr. Leonard neither approved nor disapproved of Mississippi's 1970 submission and there is nothing—no prior opinion—for him to "uphold or upset."

Beyond that, the ABA has cautioned against disqualification based upon a literal reading of Canon 9 stating that it is "too vague . . . to be useful." Formal Opinion 342 at 5 n.17; *see Westinghouse Electric Corp. v. Rio Algom, Ltd.*, 448 F.Supp. 1284, 1304 (N.D.Ill.), *modified*, 580 F.2d 1311, *rev'd on other grounds*, 588 F.2d 221 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). Similarly, the Canon and accompanying Disciplinary Rules should not become "a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules." *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir. 1975). "[W]hen there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." *Board of Education v. Nyquist*, 590 F.2d 1241,

1247 (2d Cir. 1979); *Society for Good Will to Retarded Children, Inc. v. Carey*, 466 F.Supp. 722, 725 (E.D.N.Y. 1979). "[A]bsent a threat of taint to the trial, . . . possible ethical violations are generally better addressed by the 'comprehensive disciplinary machinery' of the state and federal bar." *Armstrong v. McAlpin*, 625 F.2d at 446, *quoting Board of Education v. Nyquist*, 590 F.2d at 1246.[18]

Most importantly, there can be no taint, or appearance of it, arising from Mr. Leonard's conduct because confidentiality and secrecy were not and are not involved.[19]

The district court ordered that documents relating to the 1970 submission be produced as is proper in a section 5 proceeding. The policy of open government, *see NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978); Freedom of Information Act, 5 U.S.C. § 552; Government in Sunshine Act, 5 U.S.C. § 552b, is all important when the Government seeks to enforce section 5 of the Voting Rights Act against a state.[20]

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[18] The en banc court noted in *Armstrong* that the Reporter for the ABA committee that drafted the ABA Code had recently written that the Code's Disciplinary Rules "were drafted for use in disciplinary proceedings and were not intended to be used as rules governing disqualification motions." *Armstrong v. McAlpin*, 625 F.2d at 446 n.26, *citing* Sutton, *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C.L. Rev. 497, 514-16 (1979).

[19] There is no evidence, nor is there even a direct allegation, of Mr. Leonard's access to any secrets or confidences. Disqualification should not be permitted "based upon speculation or suspicion that confidential information may have been obtained during the course of a . . . lawyer's association" with his former employer. *Redd v. Shell Oil Co.*, [1974-2] Trade Cas. ¶ 75,392, at 98,278 (D.Utah 1974), *rev'd on other grounds*, 518 F.2d 311 (10th Cir. 1975); *see Bonus Oil Co. v. American Petrofina Co.*, [1975-1] Trade Cas. ¶ 60,315, at 66,266-67 (D.Neb. 1975).

[20] The Act is an anomaly in our political process which the Supreme Court has characterized as both "unusual" and "severe." *Morris v. Gressette*, 432 U.S. 491, 501 (1977), *citing Allen v. State*

**B. Even If The 1970 And 1979 Submissions Involve The Same Matter, The Government Waived Its Right To Disqualification.**

The Government knew by 1976, at the latest, that Mr. Leonard represented Mississippi *in this "matter."* The Government noted in its Reply Brief in *Mississippi I* that one of the issues in that case "dates back at least to the time when plaintiff's present counsel, Mr. Jerris Leonard, was the Assistant Attorney General for Civil Rights." Reply Brief for the United States at 8 n.7, *Mississippi I*, attached as Exhibit 7 to Opposition Memorandum. Yet, although the same "matter"—vote dilution—involved in the 1970 submission, in *Mississippi I*, and in this case was at issue, the Government did not challenge Mr. Leonard's qualification.[21] It never challenged Mr. Leonard's qualification in either *Mississippi I* or in *Connor v. Finch*.[22]

Additionally, on the day (April 12, 1979) of the submission that is the subject matter of this case, the Government knew that Mr. Leonard was "counsel for the legislature." Allain Affidavit at 2. Over a year ago, on June 11, 1979, Assistant Attorney General Days inter-

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*Board of Elections*, 393 U.S. 544, 556 (1969). It infringes upon each affected state's "separate and independent existence." *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976), *quoting Coyle v. Smith*, 221 U.S. 559, 580 (1911).

[21] The Government first presented its reasons for seeking Mr. Leonard's disqualification to Mr. Leonard on March 6, 1980. Memorandum in Support of United States' Motion for Order Disqualifying Counsel at 1 n.1. Even this is almost one year after the Department of Justice had notice that Mr. Leonard represented the State regarding the statute now before the district court in this case.

[22] The Government was an intervenor in *Connor v. Finch*, 431 U.S. 407. Because the same parties and the same "dilution" issue in this case were also present in *Connor*, the Government, if it had an objection, should have objected in *Connor*.

posed an objection to the implementation of the 1979 open primary bill in Mississippi. At no point in that letter did Assistant Attorney General Days raise any objection to Mr. Leonard's representation of the State in this "matter." *See* Exhibit 4 to Opposition Memorandum. It was only after Mr. Leonard, acting as special counsel for the State, filed the present lawsuit on December 27, 1979, and after Mississippi, represented by Mr. Leonard had been successful in *Mississippi I* (on June 1, 1979), that the Department of Justice decided to seek Mr. Leonard's disqualification.

In *Mississippi I*, "matters" common to this case which pertain to the implementation of the 1979 legislation were litigated, especially the dilution of black voting strength [23] and the electability of black candidates,[24] bloc voting,[25] the history of racial discrimination in Mississippi,[26] impediments to the electoral process,[27] the openness of the political system,[28] and a myriad of other related issues.

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[23] *Compare* Brief for the United States at 29, *Mississippi I*, attached as Exhibit 8 to Opposition Memorandum *and* Defendants-Intervenors' Proposed Findings of Fact and Conclusions of Law at 3, *Mississippi I*, attached as Exhibit 9 to Opposition Memorandum, *with* Memorandum of Law (unidentified but provided in response to Mr. Leonard's Motion to Compel Production of Documents) at 1, attached as Exhibit 10 to Opposition Memorandum.

[24] *Compare* Exhibit 8 to Opposition Memorandum at 13-14 *with* Memorandum from Gerald W. Jones to Jerris Leonard at 5-6 (Sept. 15, 1970), attached as Exhibit 11 to Opposition Memorandum.

[25] *Compare* Exhibit 8 to Opposition Memorandum at 12 *with* Exhibit 11 to Opposition Memorandum at 5.

[26] *Compare* Exhibit 8 to Opposition Memorandum at 1-3 *with* Memorandum from Jim Turner to Mr. Leonard at 1-3 (Sept. 17, 1970), attached as Exhibit 12 to Opposition Memorandum.

[27] *Compare* Exhibit 8 to Opposition Memorandum at 13-14 *with* Exhibit 11 to Opposition Memorandum at 8.

[28] *Compare* Exhibit 7 to Opposition Memorandum at 12-16 *with* Exhibit 12 to Opposition Memorandum at 2-3.

A motion to disqualify "should be made with promptness and reasonable diligence once the facts are known." *Milone v. English*, 306 F.2d 814, 818 (D.C.Cir. 1962); *see Marco v. Dulles*, 169 *F.Supp.* 622, 632 (S.D.N.Y. 1959) ("A party making . . . a motion [to disqualify] should do so with reasonable diligence and promptness after the facts have become known to it."). "This knowing inaction and calculated lying in wait, taken with the hope of upsetting a future adverse decision of the Commission, constituted a waiver of appellant's rights." *International Paper Co. v. FPC*, 438 F.2d 1349, 1357 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971).

In this case, the span of time is great—10 years—and the present case does not, as discussed in Section A above, concern the same matter as dealt with by Mr. Leonard during his tenure at the Department of Justice a decade ago. Even if it did, however, the Department of Justice did not act with "reasonable diligence" in seeking Mr. Leonard's disqualification. This Court should note probable jurisdiction to decide among other questions whether the Government, having slept on its rights, can thereafter expose a litigant to the costs and hardships of counsel disqualification.[29]

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[29] As an intended consequence of disqualification, the cost and hardship to the State will be substantial. *See* Allain Affidavit at 3.

As an unintended consequence of disqualification, a precedent has been established, that, if followed, could deprive the civil rights movement, now and in the future, of some of its most knowledgeable and experienced attorneys.

> Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he is employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged.

ABA Formal Opinion 342 at 6 n.21; *see Kesselhart v. United States*, 555 F.2d 791, 793 (Ct.Cl. 1977) ("Attorneys having both private

and Government experience are often better qualified to be of value to courts, as their officers, and to their clients, public and private, than those having one or the other experience alone."). This is certainly true for Assistant Attorneys General for the Civil Rights Division—past and present. For example, civil rights legal organizations are routinely involved in the litigation of matters in which the Department of Justice has been involved. These organizations have as members of their boards and as their past chairmen at least three former Assistant Attorneys General for Civil Rights.

The Government's attempt to disqualify Mr. Leonard's entire firm may have another substantial, perhaps unforeseen, effect. "An overly strict approach to disqualification of the former government attorney and especially to disqualification of his firm impairs the client's choice of counsel and can impair the government's ability to attract non-career attorneys." *Armstrong v. McAlpin*, 606 F.2d at 32.

> If service with the government will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in practice of the very speciality for which the government sought his service—and if that sterilization will spread to the firm with which he becomes associated—the sacrifices of entering government service will be too great for most men to make. As for those men willing to make these sacrifices, not only will they and their firms suffer a restricted practice thereafter, but clients will find it difficult to obtain counsel, particularly in those specialties and suits dealing with the government .

*United States v. Standard Oil Co. (New Jersey)*, 136 F.Supp. 345, 363 (S.D.N.Y. 1955) (footnote omitted) ; *see* Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 Harv. L. Rev. 657, 668 (1957).

To avoid an attack upon him, and injury to his client and his law firm, the erection of a "Chinese Wall" to screen Mr. Leonard from further participation in this litigation was proposed. "Virtually all of the ethical problems that occasion the imputed disqualification of the firm will be solved by adequate screening. Nor should there remain an 'appearance' of impropriety, since the relevant kind of appearance is one that a reasonable person, informed of the facts, would suspect." Lacovara, *Restricting the Private Practice of Former Government Lawyers*, 20 Ariz. L. Rev. 369, 399 (1978).

## CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

/s/ Charles Morgan, Jr.

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Dated: January 14, 1981

## CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 1981, I caused three copies of Appellant's Jurisdictional Statement to be deposited in the mail, first-class postage prepaid, to:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ Edward Ashworth
EDWARD ASHWORTH

# APPENDIX

## APPENDIX

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action 79-3469

STATE OF MISSISSIPPI,

*Plaintiff*

v.

UNITED STATES OF AMERICA and
BENJAMIN R. CIVILETTI,

*Defendants*

## MEMORANDUM OPINION

Before the Court is Defendants' Motion to Disqualify Counsel Jerris Leonard in the above captioned Voting Rights Act litigation. The facts may be summarized as follows:

In 1970 Mississippi attempted to enact an "open primary" voting system. In this system, all voters would select the candidates for the general election in one primary. If a candidate received a majority of the votes in the primary, only his or her name would appear on the ballot in the general election. If no majority was attained, only the two candidates receiving the greatest number of votes would be placed on the ballot.

Mississippi's 1970 legislation was submitted to the Justice Department for preclearance pursuant to Section 5 of the Voting Rights Act. The Assistant Attorney General in charge of the Civil Rights Division, Jerris Leonard, although charged with Section 5 preclearance responsibility, refused to object to or approve the open primary legislation. Subsequently, suit was brought in

Mississippi to enjoin the state from employing the open primary system. *Evers v. State Bd. of Election Comm.*, 327 F.Supp. 640 (S.D. Miss. 1971). That Court held that until either the Attorney General of the United States or the United States District Court for the District of Columbia approved the open primary system, it could not be effectuated. Mississippi's appeal to the Supreme Court was dismissed for procedural reasons.

In 1971 Leonard left the Justice Department. In 1974 Mississippi re-submitted the open primary plan to the Department of Justice. Assistant Attorney General Pottinger denied Section 5 preclearance. A new open primary plan was submitted to the Attorney General in 1979, and has been rejected by the Justice Department. Mississippi then commenced this litigation, seeking Section 5 preclearance of the new open primary legislation.

Former Justice Department Attorney Jerris Leonard is currently retained by the State of Mississippi to represent the State in this action. The Justice Department contends that it is unethical for Leonard to represent Mississippi because of his participation in the Department's review of the 1970 open primary legislation. It has therefore moved to disqualify Leonard and his law firm from further participation in the instant case.

Canon 9 of the Code of Professional Responsibility states that "[a] lawyer should avoid even the appearance of professional impropriety." Disciplinary Rule 9-101(B) provides that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." To apply DR 9-101(B) to litigation before it, the Court must address the relationship between the attorney whose conduct is questioned, his opponent, and the cause of action before the Court. If the attorney was formerly employed by his opponent, and the litigation consists of a matter in which that attorney participated personally and substantially.

then the appearance of impropriety is manifest. Thus, three questions of fact must be addressed in the instant case, to wit: (1) was Leonard formerly employed by the Department of Justice; (2) did he participate personally and substantially in the Department's review of the 1970 open primary legislation; and (3) is the 1970 legislation the same "matter" as the 1979 open primary legislation before the Court?

It is uncontroverted that Leonard was employed by the Justice Department in 1970. It is also uncontroverted that Leonard was delegated the responsibility of scrutinizing the 1970 open primary legislation for possible Section 5 violations. While there may be occasions where responsibility *qua* responsibility does not reflect personal and substantial participation, this litigation is not such an instance. Leonard not only made the decision not to object to or approve the 1970 legislation, he also rejected the recommendation of his aides in arriving at his decision. It is clear from the documentation presented to the Court that Leonard was intimately involved in the Department's review of the 1970 open primary legislation.

To ascertain whether the 1979 and 1970 Acts are the same matter for DR 9-101(B) analysis, the Court must compare those Acts in the context of this litigation. The Justice Department denied—and Plaintiff is seeking—preclearance pursuant to Section 5 of the Voting Rights Act. The major impediment to such preclearance is the attempted implementation of an open primary system. The primary purpose of both Acts is the implementation of such a system, and the ultimate resolution of this case is contingent upon our analysis of this system. While Plaintiff has cited numerous differences between the two Acts, these differences involve mere technicalities that have thus far gone unchallenged by the Justice Department. These dissimilarities cannot obscure the major purpose of both Acts—to institute an open primary sys-

tem in Mississippi. In the attempted effectuation of this purpose, the Acts are identical. Because the Acts are identical in this respect, and because the open primary system must be scrutinized in light of Section 5, the two Acts must be considered the same matter for DR 9-101(B) analysis.

It is thus apparent that Jerris Leonard participated personally and substantially in the matter before the Court while he was employed by the Department of Justice. DR 9-101(B) therefore precludes further participation in this action by Leonard or any member of his law firm. An appropriate Order follows this Opinion.

/s/ Carl McGowan
CARL MCGOWAN
United States Circuit Judge

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

DATE: September 29, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 79-3469

STATE OF MISSISSIPPI,
*Plaintiff*

v.

UNITED STATES OF AMERICA and
BENJAMIN R. CIVILETTI,
*Defendants*

ORDER

Upon consideration of Defendants' Motion to Disqualify Counsel, the Opposition thereto, the entire record herein and the Memorandum Opinion filed this date, it is by the Court this 29th day of September, 1980,

ORDERED, that neither Jerris Leonard nor any member of his law firm may represent the State of Mississippi in this litigation.

/s/ Carl McGowan
CARL MCGOWAN
United States Circuit Judge

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3469

STATE OF MISSISSIPPI,
*Plaintiff*

v.

UNITED STATES OF AMERICA and
BENJAMIN R. CIVILETTI,
*Defendants.*

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The State of Mississippi, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order disqualifying its counsel, entered in this action on September 29, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ Ronald A. Goodbread
RONALD A. GOODBREAD, ESQUIRE
Special Counsel for the
State of Mississippi

LEONARD, COHEN, GETTINGS & SHER
1700 Pennsylvania Ave., N.W.
Suite 550
Washington, D.C. 20006
(202) 872-1095

DATE: October 28, 1980

## CERTIFICATE OF SERVICE

This is to certify, that I have this day mailed, postage pre-paid a copy of the attached notice of appeal to the Supreme Court of the United States to:

Paul F. Hancock, Esquire
Civil Rights Division
Department of Justice
Washington, D.C. 20530

October 28, 1980

/s/ Ronald A. Goodbread
RONALD A. GOODBREAD